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SYMPOSIUM ON COVID-19, GLOBAL MOBILITY AND INTERNATIONAL LAW

INTO THE UNKNOWN: COVID-19 AND THE GLOBAL MOBILITY OF MIGRANT WORKERS

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As the COVID-19 crisis developed, the International Labor Organization estimated that 4.7 percent of the global labor pool, comprising 164 million people, were migrant workers who were living and working outside their home country.¹ While some were laid off and sent home for the lockdown, others continued working. These others were migrants performing crucial jobs in the front line of the crisis.² They help to produce our food, pack our orders, and build or clean our houses, among other tasks. Many COVID-19 infections appear to be labor-related, with many of the crucial sectors exhibiting an extra-high risk of virus transmission.³ Migrant workers on the frontline can be low-waged, hold a temporary job, lack knowledge of their legal position and the local language, and have a limited social network and high dependency on others—such as recruiters or temporary employment agencies—for work and housing. This essay addresses these migrant vulnerabilities in the labor market and identifies measures that might simultaneously curb the vulnerabilities and account for industrial needs for labor in essential sectors. We argue that the vulnerability of migrant laborers is structural; the COVID-19 crisis has put a magnifying glass on a preexisting vulnerability and clarified the need for solutions.

We illustrate our point with the case of Romanian migrant workers employed in two Western European countries—the Netherlands and Germany. In the Spring of 2020, designated charter flights from Romania transported Romanian workers to the Netherlands and Germany. These individuals travelled because their labor was deemed essential. They stepped into the unknown, working at a variety of processing lines and living together in large numbers, all the while unable to keep a safe distance from others. For them, having a job, sending money home, must have been key. For employers, maintaining high production was similarly important.

In contrast with undocumented or temporary migrant workers in many other parts of the world, Romanians formally have strong residence rights in Germany and the Netherlands as EU citizens. But even these rights hardly guarantee a solid support structure. Among other places, Romanian migrants work as seasonal workers in

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¹ Int'l Labor Org., *Protecting Migrant Workers During the COVID-19 Pandemic: Recommendations for Policy-makers and Constituents* (POL'Y BRIEF 8, 2020).

² Francesco Fasani & Jacopo Mazza, *Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response* (IZA Discussion Paper, 2020); Francesco Fasani & Jacopo Mazza, *Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response* (IZA Discussion Paper No. 13178, 2020).

³ David Koh, *Occupational Risks for COVID-19 Infection*, 70 OCCUR MED. 3 (2020).

harvesting, or in the meat processing industry, which has been highly affected by the pandemic and targeted by multiple government measures, such as business closures, to prevent the spread of the virus. What should government authorities have done to protect the workers, and what did they do? The pertinent international legal norms, and the types of COVID-19 measures taken to protect the workers, have wider significance.

International Law on the Protection of Migrant Workers

Specific rights protecting migrant workers are guaranteed by a number of treaties, such as the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Many of these treaties have attracted very few ratifications from EU member states, but the generally applicable International Covenant on Economic, Social and Cultural rights has been ratified by Romania, Germany, and the Netherlands and provides that *everyone* has a right to the enjoyment of safe and healthy working conditions (Article 7); adequate housing (Article 11); and the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases (Article 12). In a similar vein, International Labor Organization Convention no. 97 is in force in the Netherlands (1952) and Germany (1956). This treaty obliges signatory states to provide suitable health care to migrant workers prior to their departure, during their travels, and at the time of arrival. The Council of Europe's European Convention on the Legal Status of Migrant Workers (1977), which has been ratified by the Netherlands, regulates limitations of migrant workers' rights for public health reasons. For example, some provisions regulate limits on the right to leave one's own country or to enter another country where one is entitled to work. Finally, although soft law, Objective 6 of the 2018 UN Global Compact on Migration, widely signed globally, calls for decent working conditions for migrant workers and effective regulation of the recruitment industry.

European Union Law on the Protection of Migrant Workers

The case of Romanian workers in Western Europe falls within the scope of free movement of workers, which entitles EU nationals to a right to work, and to seek work, in a different member state than that of nationality, coupled with a right to equal treatment with national workers.⁴ Equal treatment for mobile EU workers and the promotion of fair working conditions have been at the heart of the system of labor mobility set up by the European Union, as evidenced by the existence of a complex yet fragmented legal framework of protection. EU workers have a right to equal treatment with nationals in access to and during employment, including with respect to working conditions and social and tax advantages.⁵ Likewise, when it comes to pay, dismissal, or reinstatement, EU workers must receive equal treatment. National social security systems are coordinated to prevent EU workers in another member state from losing some or all of their social security rights.⁶

In practice, mobile EU workers encounter various problems and are routinely discriminated against, making free movement of workers the least utilized of the four fundamental freedoms. A directive on measures facilitating the exercise of rights conferred on workers was adopted to deal with these shortcomings.⁷ It introduces obligations for member states to ensure that obstacles to free movement are taken away. These obligations include making information and assistance available and accessible and allowing labor unions, NGOs, and other organizations to launch administrative or judicial procedures on behalf of individual workers in cases of discrimination.

Another legal category that has become increasingly relevant in relation to intra-EU labor mobility is that of posted workers. A posted worker is an employee who is sent by his employer to carry out a service in another EU

⁴ [Treaty on the Functioning of the European Union](#) arts. 45 & 18, 2012 O.J. (C 326) 47 [hereinafter TFEU].

⁵ [Council Regulation 492/2011](#), 2011 O.J. (L 141) 1.

⁶ [Council Regulation 883/2004](#), 2004 O.J. (L 166) 1.

⁷ [Council Directive 2014/54/EU](#), 2014 O.J. (L 128) 1.

member state on a temporary basis, in the context of a contract of services, an intra-group posting, or a hiring out through a temporary agency.⁸ The unusual characteristic of posted workers who are regulated by the Posting Directive is that while they perform work in a host state, they remain affiliated with their national labor market and do not formally enter the labor market of the host state.⁹ This has important consequences for their pay and work conditions and allows for different treatment between nationals, EU workers, and EU posted workers that undermines the principle of equal treatment. Existing data show that the meat industry in several member states is heavily reliant on EU nationals, a large number of whom are employed via temporary work agencies. These individuals may fall under the legal regime applicable to posted workers.

Posting is publicly associated with abusive and exploitative practices and working conditions for EU nationals, including employer deductions from posted workers' pay to cover travel, board, and lodging; bad housing conditions; poor access to legal remedies; no respect for rest and work hours; and failure to pay minimum security contributions in the home state. In the Netherlands and Germany, repeat offenders are employers in agriculture, meat processing, and construction industries, all of which are heavily reliant on EU workers.

A so-called Enforcement Directive¹⁰ was adopted in 2014 to bring improvement but was eventually seen as unable to curb the use of the business model of unfair competition through "cheap" migrant workers that had been facilitated by the original rules on posting.¹¹ The recent revision of the Posting Directive is meant to give legal effect to the principle of equal pay for equal work in the same place and to prohibit deductions from the wages of posted workers for travel, boarding, and lodging, all of which were seen as shifting the cost of posting from the employer to the employee.¹² Under the new rules, posted workers must be registered properly and receive all elements of remuneration, including different allowances if such rules exist, in the host member state. These elements include overtime rates, statutory holiday allowance, mobility allowance, Christmas bonus, and allowance for difficult work, among others. The COVID-19 crisis has made the fragmented nature of the protection enjoyed by EU (posted) workers even more salient.¹³

Romanian Workers in Western Europe During COVID-19

It is estimated that, before COVID-19, approximately three million Romanians had left the country to work abroad, mainly in other EU states. Romania is therefore heavily dependent on remittances. In March 2020, the country entered a state of emergency and imposed restrictive measures affecting travel to and from Romania. Closing the national border for its own citizens was partly justified on the ground that an *en masse* return of Romanian migrants from other hard-hit EU states would exacerbate the domestic spread of the virus. Italy and Spain are primary destinations for the migrants, so the negative economic effects of the adoption of national lockdown measures in those countries led to many Romanians losing their jobs.

For the best part of March, April, and May, international commercial air and road traffic to and from most EU states was suspended.¹⁴ However, at the height of the national lockdown, Romania, the Netherlands, and

⁸ [TFEU](#), *supra* note 4, art. 56.

⁹ [Council Directive 2018/957/EU, revising Directive 96/71/EU](#), 2018 O.J. (L 173) 16.

¹⁰ [Council Directive 2014/67/EU](#), 2014 O.J. (L 159) 11.

¹¹ JENS ARNHOLTZ & NATHAN LILLIE, [POSTED WORK IN THE EUROPEAN UNION: THE POLITICAL ECONOMY OF FREE MOVEMENT](#) 4 (2020).

¹² [Council Directive 2018/957/EU](#), 2018 O.J. (L 173) 16.

¹³ There also is regulation [2019/1149/EU](#), 2019 O.J. (L 186) 21, which establishes the European Labour Authority to watch over the protection of social and work conditions in the European Union. The Authority is not yet operational.

¹⁴ [Military Ordinance no. 1](#) (Romania) (Mar. 18, 2020); [Military Ordinance no. 4](#) (Romania) (Mar. 29, 2020).

Germany introduced exceptions for the transport of seasonal workers.¹⁵ Romanian media showed images of almost two thousand persons queuing without any social distancing measures waiting to be flown to Western Europe for work. Generally speaking, there have not been efforts to better regulate the recruitment of workers during the crisis. For example, the Romanian government has not paid attention to the pre-departure health and safety of citizens whom it allows to travel to work elsewhere in the European Union, even if they are traveling to countries where the virus is widespread.

In some cases, Romanian migrant workers faced working environments that were not (yet) up to speed with COVID-19 measures prescribed by the German and Dutch governments. Individuals are known to have contracted COVID-19 while at work in the meat industry in the Netherlands¹⁶ and Germany,¹⁷ in addition to the United Kingdom.¹⁸ In May 2020, Romanian media reported cases of migrant workers laid off and left on the streets by their employers in Germany.¹⁹ In a huge COVID-19 outbreak in a meat processing plant in Gütersloh, North Rhine Westphalia, more than 1500 of 7000 workers tested positive, requiring 640,000 residents of the affected counties to return to lockdown conditions.²⁰ Similar outbreaks occurred in the Netherlands, the largest exporter of meat in the European Union, where roughly 80 percent of the workers in the meat industry are from Central and Eastern Europe. These outbreaks have helped to catalyze recognition that East European migrant workers in the Netherlands occupied a vulnerable position even before the pandemic.

Most of the Romanian workers are employed by temporary agencies rather than as direct hires at the meat processing companies. The workers depend on these agencies for transport, health insurance, and accommodations, but the accommodations are often so overcrowded as to make social distancing impossible. In addition, some of the workers have been infected while working in German plants and living in group housing in the Netherlands (or vice versa), or while working at plants on both sides of the border. These workers are not registered in a municipality or in their housing, making contact-tracing virtually impossible. As temporary hires without paid sick leave, they can easily lose their job and in many cases their housing. Forced to take a chance, they did not complain or report in sick. Large-scale infections occurred as a result.

A system that allows for such worker insecurities, irrespective of whether they are migrants, is not designed in conformity with international norms such as the International Covenant on Economic, Social and Cultural rights. For example, migrant housing that does not facilitate social distancing violates the right to adequate housing, and the lack of enforcement of COVID-19 measures at the workplace violates the obligation to prevent and control epidemic diseases. The lack of health checks prior to departure and at the point of arrival violates obligations to provide suitable healthcare under International Labor Organization Convention no. 97. These international norms are enshrined in EU law as part of the “constitutional traditions and international obligations common to the Member States.”²¹ While the inequalities between EU workers and posted workers are a typical aspect of the EU free movement regime, a lack of member state enforcement of the fragmented norms covering these regimes and subsequent ill treatment of migrant workers (in the workplace, homes, and health care) violates EU legal obligations towards the migrant workers.

¹⁵ [Military Ordinance no. 7](#) (Romania) (Apr. 4, 2020).

¹⁶ Press Release, [Romanian Ministry of Foreign Affairs](#) (May 21, 2020).

¹⁷ Press Release, [Romanian Ministry of Foreign Affairs](#) (June 18, 2020).

¹⁸ Press Release, [Romanian Ministry of Foreign Affairs](#) (July 21, 2020).

¹⁹ Alina Kühnel, *Sezonierii Români: Nu Toți Sunt Bineveniți în Germania*, DEUTSCHE WELLE (May 18, 2020).

²⁰ John Middleton et al., *Meat Plants: A New Front Line in the COVID-19 Pandemic*, 370 *BMJ* 1 (July 9, 2020).

²¹ [Charter of Fundamental Rights of the European Union](#) preamble, 2007 O.J. (C 303) 1.

Both Germany and the Netherlands have been aware of their reliance on precarious migrant workers in essential sectors. COVID-19 confronted them, again, with the need to improve enforcement of international norms regarding working conditions. At first, the Dutch Labor Inspectorate, out of fear for infection of their staff, did not perform inspections, while German inspectors did. The Dutch government did establish a task force to formulate recommendations for improving the working and living conditions of migrant workers, suggesting, for example, the use of electric bicycles for distancing during travel, registration at housing facilities, and a ban on bogus temporary agencies. But the system of subcontracting—which is more widespread in the Netherlands than in Germany and has been seen as the major cause of the multiple dependencies—has not (yet) been addressed in a structural manner in the Netherlands. In contrast, the German response has included stricter regulations on the meat industry, including an outlawing of subcontracting which will come into effect in January 2021.²² Moreover, since late August 2020, the German Minister for Agriculture has considered a ban on advertising cheap meat. Such a reform views consumers as part of the problem of low-cost production involving migrant workers.²³

Ways Forward

The COVID-19 pandemic is, among other crises, a migration crisis: we have seen huge movements of migrant workers who are forced to return home, laid-off, or employed at workplaces that pose a high risk of infection. The pandemic is also a migration crisis because it reveals how the need for migrant workers in certain industries to perform jobs for which the national work force is not available has proven so strong that these industries set aside international—and in the case of the Romanian workers, European—legal obligations and specific COVID-19 measures geared towards the protection of migrant workers. COVID-19 has presented us with a clear view of how the global demand for “instantly anything, preferably cheap” is available at significant cost to migrant workers and their rights.

We see three ways forward that bear relevance not just for the European Union and migrant workers in the meat processing industries but globally and in any industry. First, states need to consider changes in the industrial politics of industries relying heavily on migrant labor. This could mean an increased focus on robotization or raising consumer awareness of the (social) costs of the cheap food and increasing pricing (or taxing) to allow business (or government) to provide better labor conditions for migrant workers. Second, states should fund programs not only to inform migrant workers of their rights, but also to enhance workplace inspections, investigate third-party—e.g., NGO or labor union—claims, and otherwise ensure the labor rights of migrant workers. Third, because fragmented EU and national legislation is not doing the job, states should pursue integrated reforms on the international, regional, national, and local level. Such changes would align with Objective 6 on fair and ethical recruitment and decent work in the Global Migration Compact, and build towards the aim to “protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination.”²⁴ COVID-19 has increased awareness that maximizing socioeconomic benefits can only be an option if the right to healthy and safe working conditions of migrant workers on the frontline is taken seriously. Germany’s outlawing of subcontracting in certain sectors and its addressing of meat consumption are examples of systemic change that could create a safer environment.

²² Rebecca Staudenmeier, [Germany Agrees to Stricter Meat Industry Regulations Following Coronavirus Outbreaks](#), DEUTSCHE WELLE (May 20, 2020).

²³ [Duitsland Overweegt Reclameverbod op Vlees in te Voeren](#), FINANCIEEL DAGBLAD (Aug. 31, 2020).

²⁴ [Global Compact on Migration](#) para. 22 (2018).